FEB 10 1959
JAMES R. BROWNING, C

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 694

ORBO THEATRE CORPORATION, *Petitioner*

v.

LOEW'S, INCORPORATED, ET AL., *Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOSEPH G. DOOLEY
1604 K Street, N. W.
Washington 6, D. C.
*Attorney for Petitioner*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## INDEX


| | Page |
|---|---|
| Opinions Below | 2 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes Involved | 3 |
| Statement | 3 |
| Reasons For Granting The Writ | 9 |
| Argument | |
| I. The District Court Erred in Declining to Consider Petitioner's Right to An Availability of Less Than Twenty-One Days | 10 |
| II. The Courts Below Erred in Rejecting the Evidence Proffered by Homer Hoyt | 11 |
| Conclusion | 12 |
| Appendix | 1a |


## TABLE OF AUTHORITIES

CASES:


| | |
|---|---|
| Fanchon & Marco v. Paramount Pictures, Inc., U.S.D.C. Cal. 100 F. Supp. 84; aff'd 215 F2 167; cert. den. 348 U.S. 912; 75 S. Ct. 293, 99 L. Ed. 715 | 5 |
| Gary Theatre Co. v. Columbia Pictures, (C.C.A. 7) 120 F2 891 | 5 |
| Theatre Enterprises v. Paramount Film Dist. Corp., (C.A. 4) 201 F2 306; aff. 346 U.S. 537; 74 S. Ct. 257; 98 L. Ed. 273 | 5 |
| United States v. E. I. Dupont De Nemours & Company) U.S.D.C., Del., 118 F. Supp. 41, aff'd 351 U.S. 77, 100 L. Ed. 1264, 76 S. Ct. 994 | 12 |

Page

United States v. J. I. Case Co., U.S.D.C. Minn. 101 F. Supp. 856 ..... 12

United States v. Paramount Pictures, et al., 334 U.S. 131; 68 S. Ct. 915; 92 L. Ed. 1260 ..... 2, 6, 9

STATUTES:

District of Columbia Code (1951 Ed.): Title 11 Sec. 306 ..... 2, 1a

Clayton Act: Act of October 15, 1914, c. 323 Sec. 4, 38 Stat. 731; 15 U.S.C.A. Sec. 15 ..... 2, 1a

Judicial Code: 28 U.S.C. Sec. 1254(1) ..... 2

## REFERENCES

References to "J.A. p. ——" are references to pages of the Joint Appendix filed in the United States Court of Appeals.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

---

No.

---

ORBO THEATRE CORPORATION, *Petitioner*

v.

LOEW'S, INCORPORATED, ET AL., *Respondents*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

*To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Orbo Theatre Corporation, prays that a writ of certiorari issue to review the judgment of the United State Court of Appeals for the District of Columbia Circuit, entered in the above entitled cause on November 13, 1958, which affirmed a judgment dismissing the complaint, after trial to the United

States District Court for the District of Columbia (Holtzoff, J.). Plaintiff's action was instituted under the anti-trust laws of the United States for an injunction and treble damages.

## OPINIONS BELOW

The opinion of the Court of Appeals is unreported. The opinion of the District Court is reported in 156 F. Supp. 770 and is reproduced in the Joint Appendix, filed herewith, at pages 63-77.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 13, 1958 and affirmed the Judgment of the United States District Court for the District of Columbia, entered on December 11, 1957. The jurisdiction of the United States District Court was invoked under the provisions of Title 11, Section 306 of the District of Columbia Code, and Section 4 of the Clayton Act (Act of October 15, 1914, c 323; 38 Stat. 731; 15 U.S.C.A. Section 15.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

## QUESTIONS PRESENTED

1. In an action under the Sherman Act, wherein a motion picture exhibitor complains that a delayed availability is violative of this Court's decision in *United States* v. *Paramount Pictures, et al.*, 334 U.S. 131, may the Trial Court decline to consider reducing the clearance period on the ground that it may not substitute its judgment for the business judgment of distributors of film and first-run exhibitors?

2. May an expert witness, in such an action testify to his conclusions based on statistical data gathered

by means of a random survey conducted under his supervision?

## STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*.

## STATEMENT

Petitioner is a Maryland corporation, doing business in Rockville, Maryland, where it operates a motion picture theatre known as the "Villa". The Villa opened for business on December 1, 1955, following extensive renovations of an old theatre—renovations which cost a little less than $98,000 (J.A. 79, 80, 82-83; Pltf's Exh. 3).

From the very beginning, the Villa, though fifteen miles from the center of Washington (J.A. 46) and, therefore, fifteen miles from the "first-run" houses served by the Respondents, was subjected to a twenty-one day clearance. Stated in non-trade language, this meant that feature films distributed by the Respondents were held back from the Petitioner's theatre until twenty-one days after they had finished playing at the comparatively few first-run theatres, all of which are in the general vicinity of F Street, Northwest (Stipulation of facts, J.A. 18-19).

Concededly, Petitioner's theatre is not the sole victim of the clearance pattern enforced by the Respondents. Once we leave the F Street area there is no theatre in the District of Columbia or Montgomery County which plays motion pictures earlier than twenty-one days after the close of the run at a first-run house (id. J.A. 19). Similarly, with the exception of

the theatre in Laurel, Maryland, all Prince George's County theatres are held back twenty-one days. Across the Potomac, there it a departure from this twenty-one day rule; in Alexandria, feature pictures generally open fourteen days after they close in the downtown Washington houses (See Appendix to Plaintiff's Trial Memorandum, J.A. 9-16, received as an unnumbered Exhibit, J.A. 98).*

This action went to trial on a pleading which alleged that the Respondents "by concerted action and agreement among themselves" and "by agreement between each defendant and 'first-run' theatres in the City of Washington" arbitrarily restricted the release of motion pictures to the Villa for minimum periods of twenty-one days after the close of the premiere showing. Such agreements, it was alleged, constitute unlawful restraints of trade in that they unreasonably deprived the Petitioner of the opportunity to exhibit newly produced motion pictures "in the area where Plaintiff's theatre is not in direct competition" with first-run theatres (J.A. 3-4). By way of relief, Petitioner prayed for an injunction ordering release of the Respondents' product simultaneously with the premiere exhibition in Washington, and damages.

The Trial Judge found the evidence insufficient to establish a horizontal conspiracy among the Respondents (J.A. 69-70) but deemed it necessary to

> "proceed to determine whether the clearance system of which the plaintiff complains constitutes a series of illegal restrictions." (J.A. 72)

This step was essential because the second aspect of the case involved the legality of the clearance agreements.

* This Appendix was prepared from the answers to Interrogatories (J.A. 300-353) in which Respondents stated the clearance periods and the terms of the clearance agreements.

between the distributors and the first-run houses, the agreements under which the Respondents agreed to hold back their product from the Villa.

Principally by reference to three cases which questioned the legality of the clearance agreements dealing with theatres in Baltimore, Los Angeles and Gary, Indiana (*Theatre Enterprises* v. *Paramount Film Dist. Corp.*, 201 F2 306, aff'd 346 U.S. 537; *Fanchon & Marco* v. *Paramount Pictures, Inc.*, 100 F. Supp. 84, aff'd 215 F2 167, cert. den., 348 U.S. 812; *Gary Theatre Co.* v. *Columbia Pictures*, 120 F2 891), the District Court concluded that the clearance over Petitioner's theatre was not unreasonable.

No mention was made of any competitive factors which would justify a twenty-one day clearance over the Villa and, more than that, the District Judge disclaimed authority to decide whether a clearance period less than twenty-one days was dictated by the facts. In the language of the Trial Judge (J.A. 75):

> "It may be argued with some degree of cogency that a fourteen day waiting period would be sufficient in the case at bar, because that is the limitation invoked as against theatres located in Alexandria Virginia. The Court may not, however, substitute its own judgment for the business judgment of the parties. All that it may determine is whether the negative covenants actually used are beyond the bounds of reasonable restrictions. It may not decide whether a lesser restraint might possibly be sufficient. The Court may not undertake to dicate to the management of business concerns how to conduct and operate their enterprises, but is confined to deciding whether what they are actually doing transcends the law."

Such a position is astonishing, for, under the rule of the principal decision in this field of litigation

(*United States* v. *Paramount Pictures, et al.*, 334 U.S. 131), clearance is not justified if there is no substantial competition between the first-run and subsequent run theatre. Secondarily, under the *Paramount* decision, the existence of some competition may justify some clearance but not the clearance in force.

Manifestly, the evidence offered the District Court a wide range for affirmative action. Admittedly, Alexandria theatres—about half as far from downtown Washington as Rockville—operate under fourteen days' clearance. If the Alexandria theatres do no competitive harm to the first-run houses, only some unusual explanation would demonstrate the need for any protection at all against the Villa.

When the Trial Judge asked one of the Respondents' witnesses, a circuit owner, to explain the circumstances of the difference between Alexandria and Montgomery County clearances, the answer was (J.A. 231):

> "Your Honor, I do not understand that myself. It has been the practice."

Others confessed that they had never made any special study of the competitive factor (J.A. 118, 123, 134, 161, 170, 181), or that they did not know what percentage of their customers at the first-run theatres came from Montgomery County (J.A. 273). Still another testified that the reason the Rockville availability could not be advanced was the anticipated pressure from all theatres between F Street and Rockville for a similar advance in run (J.A. 247-248).

On the record as it stood at the time of decision, there was sufficient room for a positive approach and affirmative relief; no reason founded on the facts was advanced for refusing to exercise authority.

As part of its case, Petitioner attempted to establish, affirmatively, that there was no substantial competition between the Villa and the F Street theatres. To demonstrate the point vividly, the Petitioner offered proof through Homer Hoyt, a market analyst and real estate economist. Mr. Hoyt's thirty-two years experience in the field qualified him as an expert and his qualifications were conceded (J.A. 140-141). Had the evidence, proffered through Mr. Hoyt, not been rejected, it would have established that of all annual movie attendances from among the movie-goers in Rockville, only 4.7 per cent of them were at downtown first-run houses (J.A. 151).

In advance of trial, Mr. Hoyt conducted a survey of the movie-going habits of the Rockville population by sampling

> "300 households containing over 1200 people, or 5 percent of the population of Rockville."

This sampling process began with the preparation of a questionnaire (J.A. 143; Pltf's Exh. 4).

Hoyt then instructed his associate, a member of the faculty of American University,

> "to take a random sample, sample each area in the city of Rockville, and to take one house out of every twenty."
>
> "Q. Was there any particular reason why you instructed her to make this a random sampling?"
>
> * * * * * *
>
> "* * * We wanted an absolutely scientific test according to approved methods of sampling so that there would be no bias in the results, that every area would be represented." (J.A. 144)

At this point, for all practical purposes, the proof came to a halt. From there on, the proceedings lapsed into arguments concerning admissibility and the essence of Mr. Hoyt's proposed testimony can only be gathered from an examination of the questionnaire (Pltf's Exh. 4) and the survey itself (Pltf's Exh. 5 for identification).

The questionnaire ranged over six subjects. The inquiries were directed to (a) the number and ages of people in the household, (b) where they worked, (c) where and how often they went to the movies, (d) how often they went "downtown", (e) shopping habits and (f) income bracket. True, the questionnaire covered a larger area than the percentage of downtown moviegoers but necessarily so; otherwise the witness would have been unable to explain and vouch for the conclusion that of "all movie attendances during the year, only 4.7% were to first-run movies." (J.A. 50)

His explanation would have been that "Rockville residents do not appear to be oriented Washingtonward" (J.A. 50), that most of the residents are young, in modest circumstances, and

> "for both parents to go to a downtown show takes a great deal of preparation. Baby sitters, their cost and availability, the time it takes to get downtown, the cost of the trip, parking difficulties and the greater length of time away from home. Many respondents offered the advice that they would go to the movies more often if good choices were available nearer home." (J.A. 51)

The evidence was excluded, for despite the concession of counsel for the defense that Hoyt was an expert in his field (J.A. 141)—and the Court's recogni-

tion of him as such (J.A. 142)—the Trial Judge cut off further proof on the ground that the expert was giving fact testimony in violation of the hearsay rule (J.A. 152-155).

On trial and in the Court of Appeals, the Petitioner's argument, in the main, was that Hoyt's proof was opinion evidence and that he, like all other experts, could testify to his conclusions regardless of the methods resorted to for assembly of the facts. On the other hand, Petitioner did press, in the Court of Appeals, the argument that economic surveys are admissible in anti-trust litigation to establish economic facts. On this record, the question of admissibility is squarely presented.

## REASONS FOR GRANTING THE WRIT

1. This action was grounded in this Court's decision in *United States* v. *Paramount Pictures, et al.*, 334 U.S. 131. That decision was taken to mean 1) that where there is no substantial competition between a first run theatre and a subsequent-run theatre, there shall be no clearance and 2) that where there is substantial competition between the first and sub-run houses, there shall be only such clearance as may reasonably be needed to protect the distributor and first run operator.

If these two premises are correct, then, in each case, the Courts must examine the facts to determine 1) if any clearance is justified and 2) what clearance is justified. To permit them to deny their authority to explore the facts on the question of "lesser restraint", to use the words of the Trial Judge, is to permit them to emasculate the Paramount decision.

2. In at least two cases under the anti-trust laws, decided within the last eight years, economic surveys have been resorted to for the purpose of establishing the truth of the facts reported. The use of surveys in the business world as a method of establishing economic facts has become more and more common and, it is respectfully submitted, that the record in the case at bar presents a state of facts for decision on the question of the use of surveys in the Federal Courts and the limitations to be prescribed in respect of their reception in evidence.

## ARGUMENT

### I

### The District Court Erred in Declining to Consider Petitioner's Right to An Availability of Less Than Twenty-One Days

Petitioner, in its pleading, sought the removal of all clearance over the Villa Theatre. That prayer for relief it believed to be justified. At the same time, however, it did not limit its position to one of all or nothing. The case was tried within the framework of the Paramount decision, *supra,* which enjoined the film distributors from maintaining

> "a system of clearances, or from granting any clearance between theatres not in substantial competition, or from granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted." (334 U.S. 131, 147)

In the face of this, the overriding principle, it was the obligation of the Courts below to examine the facts and say, on the facts, that there should be no

clearance or, if the facts justified some clearance, to say precisely what the clearance should be. It was not for them to say, as the District Court did, that what was valid in Baltimore, Los Angeles and Gary was valid fifteen miles out of Washington.

Neither was it permissible for them to wash their hands of the matter and deny authority to "substitute (their) own judgment for the business judgment of the parties" to the clearance agreement. The busines judgment argument is thoroughly unsound; every contract in restraint of trade is dictated by the business judgment of those who make it and in every anti-trust case the Courts are called upon to inject their rulings in substitution of what the offenders have done.

The District Court should have examined the economic factors and on those factors alone decided the issue and determined precisely what clearance, if any, would be enforced in the future.

## II

### The Courts Below Erred in Rejecting the Evidence Proffered by Homer Hoyt

Homer Hoyt was offered as an expert witness who would have testified to the absence of substantial competition between the first-run houses in Washington and Petitioner's theatre in Rockville. This expert was shut off because his opinion generated from hearsay evidence.

Petitioner does not withdraw from the position taken below that an expert may offer an opinion drawn from unwitnessed facts; it urges, additionally, that the survey method, accepted as it is in the business world, should be accepted in the courts.

In two recent anti-trust cases, the District Courts have authorized the use of reports of surveys and questionnaires to establish the truth of the facts reported.

*United States* v. *J. I. Case Co.*, 101 F. Supp. 856;

*United States* v. *E. I. DuPont De Nemours & Company*, 118 F. Supp. 41, aff'd 351 U. S. 377.

On trial of the *Case* action, the District Court received in evidence, bulletins, dealer analysis reports and dealer questionnaires. The Government was permitted to introduce 78 such reports from a total of 12,000 dealers and the results of 108 of a total of 3,676 questionnaires.

In the *Du Pont* case, extensive surveys, studies by trade associations and reports of the defendant's salesmen were admitted on the issue of monopoly power allegedly exercised by the defendant.

New techniques for the development of facts in issue are not rejected by the Courts because they run counter to orthodox rules. Here, a new method has been developed and it is respectfully submitted that this Court should decide the extent to which and the circumstances in which it may be employed in the Federal Courts.

## CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH G. DOOLEY
1604 K Street, N. W.
Washington 6, D. C.
*Attorney for Petitioner*

## APPENDIX

District of Columbia Code (1951 Ed.).

Title 11, Sec. 306 (Jurisdiction of United States District Court for the District of Columbia)

> "Said court (except as otherwise provided in this title) shall have cognizance of all crimes and offenses committed within said district and of all cases in law and equity between parties, both or either of which shall be resident or be found within said district and also of all actions or suits of a civil nature at common law or in equity, in which the United States shall be plaintiffs or complainants; and of all seizures on land or water, and all penalties and forfeitures made, arising or accruing under the laws of the United States."

Act of October 15, 1914, c. 323, Sec. 4, 38 Stat. 731, 15 U.S.C.A. Sec. 15 (Clayton Act)

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

## Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,362

ORBO THEATRE CORPORATION, APPELLANT

v.

LOEW'S INCORPORATED, *et al.*, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided November 13, 1958

*Mr. Joseph G. Dooley* for appellant.

*Mr. John F. Caskey*, with whom *Messrs. William R. Glendon* and *Stanley Godofsky* were on the brief, for appellees. *Mr. Joseph T. Childs* also entered an appearance for appellees.

Before JACKSON, a Senior Judge of the United States Judge of the United States Court of Customs and Patent Appeals, sitting by designation, and BAZELON (presiding) and BASTIAN, Circuit Judges.

PER CURIAM: This is an appeal from a judgment of the District Court dismissing plaintiff's (appellant's) complaint. The action was for an injunction and treble damages, based upon an alleged violation of the antitrust laws.

Briefly stated, plaintiff asserted that defendants (appellees) had entered into a mutually devised plan or conspiracy to hold back the film availability of plaintiff's motion picture theatre to an absolute minimum of twenty-one days; that no clearance over the theatre was justified since it was claimed there was no substantial competition between first-run houses and plaintiff's theatre; and that,

even if there were substantial competition between the first-run theatres and plaintiff's theatre, the long delayed availability was wholly unjustified.

The case was tried before the District Court without a jury. That court directed that the issue of liability be heard first, and announced that, if the plaintiff prevailed, the trial would be resumed for the purpose of ascertaining the amount of damages, if any. After the conclusion of the hearing on the issue of liability, the District Court took the case under advisement, and thereafter filed its opinion[1] and entered judgment dismissing the complaint on the merits and with prejudice.

On examination of the record, we find no reason to disturb the trial court's ruling on the question of evidence complained of by plaintiff or the result reached by the trial judge.

*Affirmed*

---

**Opinion of the United States District Court for the District of Columbia**

(Reproduced in Joint Appendix, filed in Court of Appeals, at pages 63-77.)

[1] 156 F. Supp. 770 (1957). Judge Holtzoff's opinion constitutes the District Court's findings of fact and conclusion of law.

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 10 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

No. 694

ORBO THEATRE CORPORATION,
*Petitioner*,

*v.*

LOEW'S, INCORPORATED, ET AL.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

## RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI

JOHN F. CASKEY
*Attorney for Respondents*
*Loew's, Incorporated, et al.*
1000 Vermont Avenue, N.W.
Washington 5, D. C.

WILLIAM R. GLENDON,
JOSEPH T. CHILDS,
*Of Counsel.*

March 10, 1959

# INDEX


| | PAGE |
|---|---|
| OPINIONS BELOW | 1 |
| QUESTIONS PRESENTED | 2 |
| STATUTES AND RULES INVOLVED | 2 |
| STATEMENT | 2 |
| REASONS WHY THE WRIT SHOULD NOT BE GRANTED | 5 |
| Introduction | 5 |
| 1. The Clearance Here Involved is Reasonable and Valid | 6 |
| 2. The Lower Courts Correctly Ruled on the Evidentiary Question Presented | 9 |
| CONCLUSION | 10 |
| APPENDIX | 1a |


## CITATIONS

CASES:


| | |
|---|---|
| *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312 | 6 |
| *Dipson Theatres* v. *Buffalo Theatres*, 190 F. 2d 951 (2nd Cir. 1951), *cert. denied* 342 U. S. 926 | 6 |
| *Fanchon & Marco* v. *Paramount Theatres*, 100 F. Supp. 84 (S. D. Cal. 1951), *aff'd* 215 F. 2d 167 (9th Cir. 1954) *cert. denied* 348 U. S. 912 | 7 |
| *Fifth & Walnut* v. *Loew's Incorporated*, 176 F. 2d (2nd Cir. 1949), *cert. denied*, 338 U. S. 894 | 6 |

PAGE

*Robbinsdale Amusement Corp.* v. *Warner Bros. P. Dist. Corp.*, 141 F. Supp. 134 (D. Minn. 1955) ..... 8

*Theatre Enterprises* v. *Paramount*, 346 U. S. 537 ... 6

*United States* v. *J. I. Case Co.*, 101 F. Supp. 856 (D. Minn. 1951) ..... 10

*United States* v. *E. I. Du Pont De Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd* 351 U. S. 377 ... 10

*United States* v. *Mills*, 237 F. 2d 401 (8th Cir. 1956) 9

*Westway Theatres* v. *Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830 (D. Md. 1940), *aff'd on opinion below* 113 F. 2d 932 ..... 6

---

STATUTES AND RULES:

Section 3 of the Sherman Act (26 Stat. 209, 15 U. S. C. § 3) ..... 2

Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 15) ..... 2

Rule 52(a) Federal Rules on Civil Procedure ..... 2

---

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

ORBO THEATRE CORPORATION,
*Petitioner*

*v.*

LOEW'S, INCORPORATED, ET AL.,
*Respondents.*

No. 694

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

---

## RESPONDENTS' BRIEF OPPOSING PETITION FOR CERTIORARI

The respondents, Loew's, Incorporated, et al., distributors of motion pictures, oppose the petition of Orbo Theatre Corporation for a writ of certiorari. The judgment below in favor of the respondents is clearly correct, presents no important or fundamental question of federal law, is not in conflict with any admonition of this Court and involves no conflict of decisions.

### Opinions Below

The per curiam opinion of the Court of Appeals affirming the judgment of the District Court, is reported in 261 F. 2d 380. The opinion of the District Court which constituted its findings of fact and conclusions of law is reported in 156 F. Supp. 770.

## Questions Presented

1. Whether each of the respondents has imposed an unreasonable restraint of trade in violation of the antitrust laws in denying petitioner's request for an earlier availability than is accorded nearby competing theatres all of which are superior in grossing power, and in granting to the petitioner's neighborhood theatre the same availability which it accorded to all other neighborhood theatres in the District of Columbia and Montgomery County.

2. Whether the Trial Court properly ruled in excluding hearsay testimony embodied in a survey, offered as proof of the facts stated therein.

## The Statutes and Rules Involved

The pertinent statutes and rules involved are Section 3 of the Sherman Act (26 Stat. 209, 15 U. S. C. § 3); Section 4 of the Clayton Act (38 Stat. 731, 15 U. S. C. § 15); and Rule 52 (a) of the Federal Rules of Civil Procedure, the pertinent texts of which are set out as an appendix to this brief.

## Statement

This is another of the many private motion picture antitrust actions alleging a conspiracy in restraint of trade and involving the question of the clearance accorded first run theatres over second run theatres. The period of clearance here involved—twenty-one days—is the period which elapses between the conclusion of exhibition of a picture at a downtown Washington, D. C., F Street theatre ("first run") and its next exhibition ("second run") at the so-called neighborhood theatres in the District of Columbia and Montgomery County. No second run theatre in the District or Montgomery County re-

ceives pictures on an availability* earlier than twenty-one days after first run Washington (J. A. 19).

Clearance is a practice dictated by the economics of the motion picture industry. There are approximately 18,000 to 19,000 open theatres in the United States (J. A. 200). Over half of these theatres pay a rental of $50 or less to license a positive print of a picture (J. A. 202). For each picture produced approximately 400-525 positive prints are made at costs ranging from $250 to $1,150 per print** (J. A. 198-200).

With these limited prints the distributors serve the theatres throughout the United States. Normally the Washington Exchanges will receive from 7 to 11 prints (J. A. 204, 208) to serve the theatres in the District, Virginia, Maryland and parts of Delaware, with the right to borrow a limited number of additional prints if they are not needed elsewhere.

Since it is obviously impossible to serve all theatres at the same time, there has developed the practice of serving pictures in a series of successive runs with an intervening period of clearance. In Washington, the pictures are shown first run generally at one of the larger, de luxe F Street theatres (J. A. 18). These theatres manifestly are expensive to operate. They charge a higher admission price, have a larger seating capacity and yield far greater revenue than do the so-called neighborhood theatres *** (J. A. 18, 211, 264) (compare Defts. Ex. 26; J. A. 271, 373 with Defts. Ex. 49; J. A. 299, 377). To enable the first run operator to meet his high operating cost and pay this large film rental, it is necessary to give him an exclusive run in his competitive area with a clearance of twenty-one days over second

---

*A first run theatre has a clearance of twenty-one days over a second run theatre. A picture then becomes "available" to the second run theatre after the expiration of the clearance period.

**This is in addition to the initial cost of producing a picture which may range from one to four million dollars (J. A. 198-200).

***For example the highest grossing picture at the de-luxe Keith Theatre in 1957, paid a film rental of $124,342. The same picture exhibited at Petitioner's Villa Theatre paid a rental of $126 (J. A. 296-299).

run theatres in the District and Montgomery County (J. A. 211). This assures the first run exhibitor that his competitors will not at the same time or immediately thereafter be exhibiting the same picture and thus diminish the anticipated first run income (J. A. 18, 212). As the Trial Court found in reviewing these factors (J. A. 65-66; 156 F. Supp. at 773), "These are legitimate business considerations".

Petitioner's 630 seat Villa Theatre is located in Rockville, Maryland, approximately 15 miles from downtown Washington (J. A. 6). It is approximately forty minutes by car from Rockville to downtown Washington via two main arteries—Viers Mill Road and Rockville Pike (J. A. 283-284). Additional transportation facilities are provided by railroad and three bus lines (J. A. 45). The Villa Theatre advertises in the Washington newspapers and on radio (J. A. 94-96; Defts. Ex. 2; J. A. 95, 357).

The Villa Theatre is one of a network of small neighborhood theatres in Metropolitan Washington. Its nearest competitor, the Rockville Drive-In, is but one mile away and there are several other competing theatres in nearby Wheaton, Bethesda and Silver Spring. Each of these theatres was open prior to the Villa (J. A. 17, 34-35). All of them play twenty-one days after Washington and all have proven to be better grossing theatres than the Villa. (J. A. 290-293; Defts. Ex. 44; J. A. 294, 374-375).

On October 21, 1955, petitioner addressed identical letters to respondents demanding an availability of fourteen days after first run Washington with clearance over the competing Rockville Drive-In (J. A. 20-21).* Shortly thereafter the operator of the Drive-In advised the respondents that he expected to continue to have clearance over the Villa** (J. A. 31-32, 288).

---

*This was subsequently enlarged to a demand in the complaint that the Villa be permitted to play day and date with first run Washington (J. A. 4).

**Prior to petitioner's acquisition, the theatre, then known as the Milo, had played on a later availability than the Drive-In (J. A. 32, 82).

To the respondents faced with these conflicting demands the solution to their common problem was, as the Trial Court found (J. A. 70, 156 F. Supp. at p. 775), "more or less obvious". Each of the distributors acting independently, as the Trial Court found (J. A. 69, 72, 156 F. Supp. at pp. 775, 776), offered to let the petitioner's theatre bid against the Drive-In for pictures on a twenty-one day availability during the drive-in season, and to grant the Villa a twenty-one day availability during the remainder of the year. (J. A. 21-29, 88-89). As one of the respondents stated in explaining its decision to petitioner (J. A. 25-26):

> "If pictures were licensed to you on a 14 day availability, you would then be playing them ahead of all the Washington neighborhood theatres and ahead of the theatres northeast of Washington in the general area of Rockville. We cannot agree to this type of discrimination in your favor."

Following this, petitioner's theatre opened for business on December 1, 1955 (J. A. 79). On February 25, 1956—less than three months later—this suit seeking damages after trebling of $660,000 and injunctive relief was begun.

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### Introduction

This case was tried below basically upon the theory that there was a conspiracy among the defendants to restrain trade in violation of the antitrust laws. The District Court found after a careful review of the evidence that there was no proof of conspiracy or concerted action stating (J. A. 69, 156 F. Supp. at p. 775):

> "There was no evidence, direct or circumstantial, oral or documentary, from which an inference of even re-

mote cooperation among the defendants in this matter could be derived."

This finding was not challenged in the Court of Appeals.

Since a finding of conspiracy is an essential element of petitioner's right to recover, *Theatre Enterprises* v. *Paramount*, 346 U. S. 537, 540; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312, petitioner's failure to challenge in the Court of Appeals this finding on an element essential to recovery, renders moot the issues which it raises here.

Even were this not the case, the claimed errors assigned are without merit.

**1. The Clearance Here Involved Is Reasonable and Valid**

The practice of runs and clearances, as such, has been recognized as indispensable to the motion picture industry. *Fifth & Walnut* v. *Loew's Incorporated*, 176 F. 2d 587 (2nd Cir. 1949), *cert. denied*, 338 U. S. 894; *Dipson Theatres* v. *Buffalo Theatres*, 190 F. 2d 951 (2nd Cir. 1951) *cert. denied*, 342 U. S. 926; *Westway Theatres* v. *Twentieth Century-Fox F. Corp.*, 30 F. Supp. 830 (D. Md. 1940), *aff'd on opinion below*, 113 F. 2d 932 (4th Cir. 1940).

The District Court found that requiring the petitioner's Villa Theatre to wait twenty-one days after first-run Washington did not impose an unreasonable restraint of trade (J. A. 75, 156; F. Supp. at 779). The decision was affirmed by the Court of Appeals per curiam. The finding is not "clearly erroneous" within the purview of Rule 52(a) of the Federal Rules of Civil Procedure. It is, in fact, clearly correct.

Petitioner first appears to contend that the District Court did not consider the relevant factors in determining the validity of the clearance. This contention, also made unsuccessfully in the Court of Appeals, is without merit.

In making its finding of reasonableness the District Court considered *inter alia*: the impracticality of showing a picture

contemporaneously at all theatres; the larger size and higher admission prices of the first run houses and their central location; the need to protect these theatres by a clearance period against the undue inroads of competition; the fact that these first run theatres yield a substantial portion of the distributors' revenue; and the geographic proximity of Rockville to downtown Washington (J. A. 64-66, 156 F. Supp. at pp. 772-774). Finally, the Court considered the resulting discrimination against competitors of the Villa Theatre if the latter's request for a lesser clearance period were granted, stating (J. A. 67, 156 F. Supp. at 774):

> "This request posed a problem for the distributors. The Drive-In Theater is commodious, has a considerable capacity, and was in successful operation. To have yielded to the demand, would have been to discriminate against the Drive-In Theater. Moreover, pressure on the part of theaters in Bethesda, Silver Spring and Wheaton for similar treatment and, therefore, a reduction of the twenty-one day clearance to a fourteen-day clearance could reasonably be anticipated in the event that the request of the Villa were granted. In turn, there was a possibility of repercussion from neighborhood houses in Washington."

The relevancy of these factors is perhaps best demonstrated by *Fanchon & Marco* v. *Paramount Pictures* 100 F. Supp. 84 (S. D. Cal. 1951), *aff'd*, 215 F. 2d. 167 (9th Cir. 1954), *cert. denied* 348 U. S. 912. There the Court stated (100 F. Supp. at p. 98):

> "Whenever a change of availability is asked, the producer has two considerations to take into account: (1) Whether the change would result in additional revenue, and (2) whether the change would affect other theatres in the area."

The discriminatory effect of petitioner's demand was found by the Court. Certainly no reason appears from this record

why the poorest grossing theatre in the area should have been granted such an advantage over its nearest competitors. Similarly, petitioner failed to show that the granting of its request would result in additional revenue. Rather, the converse is true. The record is clear that granting the Villa a fourteen-day availability would probably result in a loss of a first run exhibition and certainly would have reduced materially a picture's value to the first-run exhibitors and hence to the distributors (J. A. 275). Certainly no distributor could reasonably be expected to risk the possible loss or diminution of its first run revenue by acceding to petitioner's discriminatory request.

Petitioner further urges that the lower courts were somehow derelict in failing to determine (Petition, pp. 10-11) ". . . that there should be no clearance or, if the facts justified some clearance, to say precisely what the clearance should be". This curious argument confuses not only the function of the courts but also the record. The Court did determine that clearance was proper and did decide that a twenty-one day clearance was reasonable. Having reached this determination its function was ended. To urge that it should judicially declare that while a twenty-one day clearance was not unreasonable, a fourteen-day clearance was prescribed would be, as the Trial Court recognized (J. A. 75, 156 F. Supp. at p. 778), to "substitute its own judgment for the business judgment of the parties". This the courts will not do. As the Trial Court recognized (J. A. 75, 156 F. Supp. at p. 778) in discussing this point and quoting from *Robbinsdale Amuse. Corp.* v. *Warner Bros. P. Dist. Corp.* 141 F. Supp. 134, 141 (D. Minn. 1955):

> " 'The distribution and allocation of motion pictures to theatres will always present a difficult and delicate problem. Courts should be hesitant to disrupt an established system of runs and clearances in absence of convincing proof that its genesis is the result of conspiratorial connivance, and that it is unreasonable.' "

**2. The Lower Courts Correctly Ruled on the Evidentiary Question Presented.**

The petitioner assigns as one ground for the granting of the writ that the courts below erred in a ruling on an evidentiary question. This contention arises from the exclusion by the Trial Court of certain hearsay testimony attempted to be offered by the petitioner through the witness Hoyt (J. A. 152-155). The Court of Appeals in its per curiam decision affirmed this ruling, 261 F. 2d 380, 381.

The proffered evidence from which this ruling arose was the attempt by petitioner to introduce the results of a survey, offered as evidence, not of a state of mind but rather to prove the facts stated therein. On appeal the petitioner urged primarily that the witness could state an opinion based on the results of a survey even though the survey itself might be inadmissible. Now petitioner is urging as an alternative ground that the survey itself was admissible.

The first ground was not presented to the Trial Court. The question asked to which objection was made was (J. A. 145):

> Q. "Would you tell us, Mr. Hoyt, from the tabulation which you have obtained, first of all the percentage of the population of the city of Rockville who are moviegoers?
>
> Mr. Caskey: That is objected to."

This question and the objection thereto were the basis of the trial court's ruling and it is clear from an examination of the record J. A. 145-155, that petitioner was not offering any opinion testimony but rather was attempting to establish as facts the results derived from the survey. The petitioner cannot now construct a line of testimony not tendered in the trial court and then complain that it's exclusion constitutes error. *United States* v. *Mills*, 237 F. 2d 401 (8th Cir. 1956). Furthermore the contention made by the petitioner that the survey

itself was admissible is wholly invalid. The witness Hoyt, through whom the testimony was proffered, had participated in the development of the questionnaire used, but had not supervised the survey or compiled the results (J. A. 143-145). This was done by a third party (J. A. 144-145) not called as a witness, who in turn employed seventeen students not otherwise identified to conduct the actual interviewing (Pl. Ex. 5 for iden., J. A. 50). They in turn had questioned the interviewees not only about their motion picture going habits but also those of other members of their families not actually interviewed (J. A. 154). The information thus proffered by the witness Hoyt was hearsay at least three times removed from the persons who knew the actual facts. Furthermore neither the supervisor of the survey nor the interviewers were proffered as witnesses to establish the reliability of the procedures actually followed in conducting the survey. Thus, quite apart from the basic objection to the competency of hearsay testimony offered as proof of the facts stated therein, the instant survey could not meet even minimal guarantees of trustworthiness and reliability.

While survey evidence has been admitted in those cases in which it comes within a recognized exception to the hearsay rule—i.e., the so-called "state of mind" exception—in no case that we know of—and the petitioner has cited none*—has a survey, offered as proof of the facts stated therein, been admitted over the hearsay objection. The Trial Court properly excluded this evidence.

## CONCLUSION

For all the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari to review the judgment

*In neither the opinion in *United States* v. *J. I. Case Co.*, 101 F. Supp. 856 (D. Minn. 1951) nor the opinion in *United States* v. *E. I. Du Pont De Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd.* 351 U. S. 377 cited by petitioner (Petition p. 12) does it appear that the hearsay objection was considered.

of the Court of Appeals for the District of Columbia Circuit in this case should be denied.

Respectfully submitted,

JOHN F. CASKEY
*Attorney for Respondents*
*Loew's Incorporated, Et al.*
1000 Vermont Avenue, N. W.
Washington 5, D. C.

WILLIAM R. GLENDON,
JOSEPH T. CHILDS,
*Of Counsel.*

March 10, 1959

## APPENDIX TO RESPONDENT'S BRIEF

### Pertinent Statutes and Rules

Section 3 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, 15 U. S. C. A. § 3 reads in pertinent part:

> "Every contract, combination in form of trust or otherwise, or conspiracy, in retraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal. . . ."

Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. § 15 reads:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in the controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Rules 52(a) of the Federal Rules of Civil Procedure reads in pertinent part:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses. . . ."